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Division I
State of Washington
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SUPREME COURT NO. 96681-8

NO. 76356-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARLON LEMAFA,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable LeRoy McCullough, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Marlon Lemafa asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Lemafa seeks review of the Court of Appeals' unpublished decision in State v. Marlon Iupati Lemafa, filed September 24, 2018 ("Opinion" or "Op."), this petition's Appendix A. The Court denied a motion for reconsideration on November 28, 2018. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Lemafa was convicted of two counts of first degree assault based on great bodily harm. In a decision that conflicts with In Personal Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011), the Court of Appeals affirmed count 1 despite a dearth of evidence that any impairment suffered was permanent. Should this Court grant review under RAP 13.4(b)(1) and reverse the Court of Appeals?

2. Where Lemafa struck the count 2 complainant, but then the complainant was assaulted by others, and the jury was not instructed on accomplice liability, did the State present insufficient evidence to prove Lemafa's actions were a cause-in-fact of the complainant's injury?

3. Did prosecutorial misconduct deny Lemafa a fair trial on count 1? Relatedly, was counsel ineffective for failing to object?

4. Should this Court remand for the DNA fee to be stricken consistent with State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)?

D. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence

The State charged Lemafa with three counts: (1) first degree assault of Kim Ung (intent to inflict/infliction of great bodily harm); (2) first degree assault of Johnny Nav (same); and (3) first degree unlawful possession of a firearm. CP 12-13. The State alleged that firearm enhancements applied to both assault charges. CP 12-13. The court ultimately dismissed count 3 and both firearm allegations. RP 475-81.

At the close of testimony, the court instructed the jury on defense of self and defense of others, reflecting Lemafa's defenses as to counts 1 and 2. CP 35; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN INSTRUCTIONS: CRIMINAL (WPIC) 17.02, at 253 (3d ed. 2008).

A jury convicted Lemafa of the two assault counts. CP 42-43. Under RCW 9.94A.589(1)(b), the court sentenced him to 222 months in prison—129 months on count 1 and 93 months on count 2. CP 50.

The court ordered Lemafa to pay $600 in legal financial obligations including a $100 DNA database fee.[1] CP 49. The court also ordered restitution. CP 49. However, the court found Lemafa indigent

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[1] RCW 43.43.7541

and waived all other fines. CP 223-24; see also CP 214-17 (motion and declaration for order of indigency setting forth lack of income and significant debts).

2. Evidence, in the light most favorable to the State

Kim Ung testified that he and friends including Johnny Nav and Courtney Moore went out for drinks at the "After 5" sports bar in Kent. RP 58-61. As the three were getting ready to leave in Nav's car, Nav got out of the car and walked toward a fight in the parking lot. RP 64.

Ung approached Nav and urged him to leave. RP 65, 67. But, on the way back to the car, Nav got into an argument with a young woman who appeared to be of Samoan descent. RP 68. That was Ung's last memory from the lot. RP 85. He woke up in the hospital. RP 69, 74.

Ung had suffered facial fractures, including a broken nose, as well as a concussion. RP 76-77; see also Ex. 8 (Ung's medical records from December 13-21, 2015, admitted by stipulation). He spent one day in the hospital. RP 76. He also underwent surgery to realign his nose a few days later. RP 76; see also RP 249-66 (surgeon's testimony regarding Ung's injuries as set forth in medical records, and regarding surgery performed on Ung's nose). Related to these injuries, however, Ung denied suffering from continuing pain or difficulty breathing. RP 76.

Ung also experienced hearing loss in his right ear, although his hearing had improved since the injury. RP 77. For example, in a defense interview occurring shortly before trial, he rated his hearing as seven on a scale of one to 10, whereas he had rated it as five out of 10 two months earlier. RP 80. Ung also heard a noise like a "beep" in his right ear. It was most noticeable when there was no background noise. RP 77-79. Ung did not know if his hearing would improve further. RP 79, 81.

Ung testified he received a CAT (computerized axial tomography) scan during a follow-up appointment, although he did not specify the date. Ung was told he suffered a "little fracture" near his ear. RP 78-79. Ung did not receive treatment for that. It was unclear from Ung's testimony, however, whether the injury would simply heal on its own. RP 78.

Nav, the count 2 complainant, recalled drinking throughout the evening and getting ready to leave at closing time. RP 96-97. Nav, Ung, and Moore went to Nav's car. RP 98. While the three sat waiting for another friend, Mike, a fight broke out in the lot. RP 100, 103. Nav got out of the car because he thought Mike was involved. RP 100.

Nav pulled one man off another man, who turned out not to be Mike. RP 100-02. Nav encouraged the man to flee the area. RP 104. After the man fled, an African American woman approached Nav and pleaded with him not to kill her son. RP 107, 140. Meanwhile, a second,

younger, African American woman approached Nav and attempted to punch him. RP 129-31. Nav pushed her away. RP 108.

While Nav was walking back to his car, another woman began yelling at him. Like Ung, he described the woman as Samoan. RP 114-15. She was about Nav's size and wore her hair in a bun. RP 111, 114. She was angry Nav "put hands on a female." RP 112-13.

Nav approached the woman and attempted to explain. RP 120, 134, 141. In contrast to Nav's testimony, the woman, Feronita Moe—Lemafa's cousin—testified Nav threatened her. RP 539.

Moe shoved Nav and continued to yell at him as he neared his car. RP 121, 126. A group of three men approached Nav, apparently angry he had attacked a woman. RP 118, RP 142-44. Nav again tried to explain. RP 118. Nav next recalled waking up at the hospital. RP 121, 126.

Nav lost sight in his left eye. RP 121. The eye might have to be removed. RP 454 (ophthalmologist's testimony). Nav also suffered head trauma, back pain, and neck pain. RP 122.

Dr. Eissa Hanna, an ophthalmologist at Harborview, treated Nav on December 13, the day of the fight. RP 450. Nav had suffered a ruptured "globe" or eyeball. RP 453-54. Hanna testified that, in order to produce a small hole in an eyeball, 20 kilograms of force must be applied. A single blow could not cause a rupture as large as the one Nav suffered.

RP 456-57, 459, 461. Such an injury, however, could be caused by several blows to the eye. RP 460.

Courtney Moore went to the bar with Nav and Ung. RP 172-74. At closing time, a fight broke out near Nav's car. RP 178-79. Nav got out of the car. RP 179. Moore, who became alarmed, left the car and found Nav, who followed her back to the car. RP 179, 181. Moore went to the passenger side and Nav went to the driver's side. RP 182, 204. As Nav stood by the car, a male struck Nav. He fell to the ground. Moore saw others approach Nav and appear to stomp or kick him, although Moore's view was partially blocked. RP 182, 185.

The State also presented the testimony of two Kent detectives who investigated the incident in the days and months that followed. The State played video surveillance footage during both detectives' testimony and during closing argument. Ex. 1 (collection of several videos from four different cameras); Ex. 16 (roughly chronological compilation of footage from videos in Ex. 1, totaling approximately 10 minutes).

Police began to focus on a particular man in the video. RP 291; Ex. 1. The man had arm tattoos and wore a dark vest, short sleeved shirt, and a beanie hat. RP 291, 345-46. Police identified Lemafa based on tips after a portion of the surveillance video aired on television. RP 301, 344.

Detective Melanie Robinson testified regarding the videos. E.g. RP 346-57; RP 392-95. Lemafa paces, then approaches and punches Nav twice and Ung once. Both fall to the ground. RP 354. Several people join in kicking and hitting both men—but mostly Nav—while they are on the ground. RP 355. Specifically, Moe and her boyfriend, Tony Talaga, appeared to be involved. Talaga appears to kick Nav while he is on the ground, and Moe punches him. RP 355, 400; see, e.g., Ex. 1 (camera 3, track 3 at approx. 1:20-1:50). Lemafa attempts to return to the fray, but he is held back. RP 355; see also Ex. 16.

Testifying on Lemafa's behalf, Moe and Talaga offered a different version of events than did the State's witnesses. RP 487-88, 533. Lemafa testified in support his self-defense and defense of others claims. He did not intend to cause serious injury. Rather, he intended to prevent Nav from attacking Moe, and prevent Ung from harming Lemafa. RP 607.

3. Appeal, motion for reconsideration, and relief requested

On appeal, Lemafa argued the evidence was insufficient as to both assault convictions and that prosecutorial misconduct in closing argument denied him a fair trial as to count 1 (Ung). In a September 24, 2018 opinion, the Court of Appeals rejected Lemafa's claims.

Meanwhile, on September 20, this Court issued a decision in Ramirez, 191 Wn.2d 732. This Court held that House Bill 1783

amendments to the state's LFO regime applied prospectively to cases not yet final on appeal. Ramirez, 191 Wn.2d at 748-49.

Lemafa moved for reconsideration, arguing the Court of Appeals erred in its count 1 analysis and that the DNA fee should be stricken under Ramirez. That court denied the motion. Lemafa now asks this Court to accept review, reverse both convictions, and strike the DNA fee.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(1) BECAUSE THE COURT OF APPEALS' DECISION ON LEMAFA'S COUNT 1 INSUFFICIENCY CLAIM CONFLICTS WITH A DECISION OF THIS COURT.

This Court should accept review under RAP 13.4(b)(1) because, as to count 1, the Court of Appeals' opinion conflicts with this Court's decision in Martinez, 171 Wn.2d at 364. The Court of Appeals' opinion also misrepresents the evidence, misciting and conflating testimony regarding Ung's injuries. Because the count 1 conviction rests on speculation regarding the permanency of Ung's injuries, rather than reasonable inferences from the evidence, the conviction must be reversed.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S.

358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amend. XIV; CONST. art. I, § 3.

> [A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); accord State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Sufficiency of the evidence is a question of constitutional law reviewed de novo by this Court. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The critical inquiry on review is to "'determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting Jackson, 443 U.S. at 318). This inquiry disturbs the discretion of the fact finder only "to the extent necessary to guarantee the fundamental protection of due process of law;" it focuses on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; Rich, 184 Wn.2d at 903; Green, 94 Wn.2d at 221-22. Where sufficient evidence

does not support a conviction, such a conviction "cannot constitutionally stand." Jackson, 443 U.S. at 317-18.

RCW 9A.36.011(1)(c) provides that a person "is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . [a]ssaults another and inflicts great bodily harm." "Great bodily harm" is defined as "bodily injury which creates a [1] probability of death, or [2] which causes significant serious permanent disfigurement, or . . . [3] a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Here, the State relied on the third prong of great bodily harm, and the Court of Appeals' analysis falls under that prong. As a preliminary matter, Ung, the count 1 complainant, suffered facial fractures, including a broken nose, as well as a concussion. RP 76-77; see also Ex. 8 (Ung's medical records from December 13-21, 2015). He spent one day in the hospital. RP 76. He also underwent surgery to realign his nose a few days later. RP 76; see also RP 249-66 (surgeon's testimony regarding Ung's injuries as set forth in medical records). Related to these injuries, however, Ung denied ongoing pain or difficulty breathing. RP 76. Thus, the State did not show any related injuries or impairments were permanent.

The other area of possible impairment dealt with Ung's hearing. A treating surgeon, reading a list of Ung's injuries, testified Ung suffered a "ruptured tympanic membrane." RP 253. Ung testified he experienced hearing loss in his right ear. RP 77. Ung was also told he suffered a "little fracture" near his ear. RP 78-79 ("when they did that CAT scan, they seen that there's like a little fracture somewhere . . . you know, near my ear to where there wasn't really anything they could do about it").

Ung's hearing, however, had continued to improve since the injury. RP 77. In a pretrial interview he rated his hearing as seven on a scale of one to 10, whereas he had rated it as five out of 10 only two months earlier. RP 80. Ung *did not know* if his hearing acuity would continue to improve. RP 81. Ung also testified he heard a noise like a "beep" in his right ear. It was most noticeable when there was no background noise. RP 77-79. Ung also *did not know* if that noise would continue. RP 78-79.

Turning from the evidence to legal principles, the word "permanent" is not defined by statute. Thus, this Court considers its ordinary meaning. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). "Permanent" is defined as "continuing or enduring (as in the same state, status, place) without fundamental or marked change : not subject to fluctuation or alteration : fixed or intended to be fixed :

LASTING, STABLE." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1683 (1993).

Thus, "permanent" means a fixed condition. But the evidence established that Ung's overall hearing still was improving. RP 77-81. And although he testified he had been told no medical intervention would be beneficial, RP 79, availability of treatment does not equate to permanency of impairment. Bodies can heal on their own.

Rejecting Lemafa's insufficiency claim, the Court of Appeals posited that a "fractured tympanic membrane" left Ung with a "constant beeping noise in his ear." Op. at 5. But the only witness to mention a tympanic membrane was the surgeon, who offered no evidence regarding any related prognosis. RP 253.

Indeed, the Internet reveals that ruptured tympanic membranes often heal on their own. See https://www.mayoclinic.org/diseases-conditions/ruptured-eardrum/symptoms-causes/syc-20351879 (last accessed Oct. 8, 2018). This evidence was not introduced at trial. But neither was evidence introduced that a ruptured tympanic membrane *would not* heal on its own. Lemafa had no obligation to introduce the former information to the jury. The State, in contrast, was obliged to introduce the latter if it wished to prove the elements of count 1 under a permanent impairment theory.

Thus, the Court of Appeals, in rejecting Lemafa's claim, took evidence of a ruptured tympanic membrane and connected it to a permanent beeping. But, as shown, the assertion fails logically in all respects: There was no proof the tympanic membrane would not heal on its own, there was no evidence proving a connection between the ruptured membrane and the beeping, and there was no evidence the beeping was permanent.

As this Court has determined, speculation based on ambiguous testimony is not tantamount to a "reasonable inference" drawn from established facts. Martinez, 171 Wn.2d 354. At issue in Martinez was whether evidence was sufficient to support a first degree burglary conviction where an officer chased Martinez from a building, tackled him, and noticed an empty knife sheath on his belt during a pat-down search. When the officer asked about the sheath, Martinez said that the knife must have fallen out while he was running. Officers found a knife about 15 feet from the building. Martinez acknowledged the knife was his. Id. at 358.

Because neither actual nor threatened use of the knife was at issue, the relevant inquiry was whether the State presented sufficient evidence to prove attempted use. Id. at 368. But even viewed in the light most favorable to the State, the evidence could not support such a finding. Id. No one saw Martinez with the knife, he manifested no intent to use it

either before or after he was apprehended, and he did not have access to the knife during the scuffle with the officer. "[T]he only evidence that Mr. Martinez attempted to use the knife was the unfastened sheath. This evidence is insufficient to lead a rational fact finder to find intent to use the weapon beyond a reasonable doubt." Id. at 369. Thus, this Court found insufficient evidence to support the deadly weapon element of first degree burglary. Id.

In Martinez, therefore, this Court rejected the ambiguous evidence of the unfastened sheath as too speculative to support attempted use of the knife. This Court should, similarly, find that unknown prognosis coupled with continuing improvement is insufficient to support a reasonable inference of permanent impairment. See id. at 364 ("[a] claim of insufficiency admits the truth of the State's evidence and all inferences that *reasonably* can be drawn therefrom" (emphasis added).

This Court of Appeals' opinion misstates the evidence. Moreover, careful analysis of the evidence, under the applicable law, indicates that the jury's verdict rests on speculation rather than reasonable inferences from the testimony, in violation of Martinez. This Court should grant review under RAP 13.4(b)(1) and reverse the count 1 conviction.

2. THIS COURT SHOULD ALSO GRANT REVIEW OF LEMAFA'S PROSECUTORIAL MISCONDUCT CLAIM AND RELATED INEFFECTIVE ASSISTANCE CLAIM.

This Court should grant review and find that prosecutorial misconduct requires reversal of count 1, as does defense counsel's ineffectiveness for failing to object. In holding to the contrary, the Court of Appeals opinion contravenes decisions by this Court and the Court of Appeals. RAP 13.4(b)(1) and (2). The prosecutor repeatedly misrepresented the facts related to the harms suffered by Ung. The misconduct denied Lemafa a fair trial on count 1. Moreover, counsel was prejudicially ineffective for failing to object to the misconduct.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." In re Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.

Here, the prosecutor committed misconduct by repeatedly misrepresenting evidence regarding the harms suffered by Ung. The prosecutor argued that

> [Y]ou heard [Ung] testify about the damage to his hearing in his right ear, how it was muffled for a long time. It was kind of muffled is how he described it, almost holding his hand up to his ear. And that now, to this day, he hears

> beeping when he lays down when it's quiet. *And that is not going away. That will be there.*

RP 693 (emphasis added); see also RP 751 (prosecutor's assertion, absent evidence, that Ung's hearing is permanently impaired). There was, however, no evidence from any witness to that effect.

The State went further by asserting that the functioning of Ung's body was impaired in yet another way, in that he had trouble breathing. See RP 693 ("[You] also can recall all the fractures and the surgery that was done to allow him to breathe, how his nose was pushed one way and then the other, and the surgery that made it so he could . . . more easily breathe."). Yet Ung did not report trouble breathing. RP 76-77. This detailed line of argument appears to be an invention of the State. The Court of Appeals did not even address this problematic line of argument in rejecting Lemafa's prosecutorial misconduct claim. Op. at 5.

Defense counsel did not object. Where defense counsel fails to object, prosecutorial misconduct is, nonetheless, reversible error when the misconduct is incurable by corrective instruction. State v. Walker, 164 Wn. App. 724, 730, 736, 265 P.3d 191 (2011).

Had defense counsel objected, the court—prohibited from commenting on the evidence[2]—would likely have instructed the jury that

[2] "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." CONST. art. 4, § 16.

the State's arguments were not evidence. But such an instruction would likely be ineffective. "Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant." State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (citing United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991)). The jury was likely to accept the State's version, even in the presence of a curative instruction. The argument, which confidently introduced nonexistent facts supporting a finding of "great bodily harm," was prejudicial as to count 1.

For similar reasons, Lemafa's counsel was prejudicially ineffective for failing to object. Accused persons are guaranteed the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That right is violated when (1) counsel's performance was deficient and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687.

Here, counsel rendered ineffective assistance by failing to object to the prosecutor's arguments advancing nonexistent evidence. No tactic explains counsel's failure to preserve the error, either via contemporaneous objection, or later outside the jury's presence. Defense

counsel's failure to object to the misconduct was, moreover, prejudicial. The State's argument misrepresented the evidence, claiming—without evidentiary support—that Ung's hearing was permanently affected and that his ability to breathe was also affected. The remarks likely influenced the verdict on count 1, allowing the jury to find permanent impairment despite the deficiencies described in section 1 above.

3. THIS COURT SHOULD LIKEWISE GRANT REVIEW OF LEMAFA'S COUNT 2 INSUFFICIENCY CLAIM.

Similarly, this Court should grant review and find that insufficient evidence supports count 2.

When a crime is defined to require both conduct and a specified result, the conduct of the accused must be both (1) the cause in fact and (2) the legal or "proximate" cause of the result." State v. Christman, 160 Wn. App. 741, 753, 249 P.3d 680 (2011) (quoting Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003)). As summarized by LaFave, "'[i]t must be determined that the defendant's conduct was the cause in fact of the result, which usually (but not always) means that but for the conduct the result would not have occurred.'" Christman, 160 Wn. App. at 753 (quoting LaFave, supra, at 464); accord State v. Bauer, 180 Wn.2d 929, 935-36, 329 P.3d 67 (2014). Cause in fact refers to the "but

for" consequences of an act, i.e., the physical connection between act and injury. State v. Dennison, 115 Wn.2d 609, 624, 801 P.2d 193 (1990).

The medical evidence indicated the injury to Nav's eye—which formed the sole basis for the State's claim of great bodily harm[3]—would not have been caused by a single blow, but rather by several blows. Although Lemafa struck Nav, Nav was then assaulted by several others. The jury was not instructed on accomplice liability. The State presented insufficient evidence to support that *Lemafa himself* caused the harm.

Because there was insufficient evidence to convict Lemafa of first degree assault, the conviction should be reversed. See Bauer, 180 Wn.2d at 946 (reversing conviction based on failure to prove causation); see also Winship, 397 U.S. at 364; U.S. CONST. amend. XIV; CONST. art. I, § 3.

4. THIS COURT SHOULD REMAND FOR THE DNA FEE TO BE STRICKEN.

The $100 DNA fee, which is now discretionary, should be stricken. Lemafa is indigent under RCW 10.101.010(3). CP 214-17. And House Bill 1783 applies prospectively to his case. Consistent with Ramirez, the $100 DNA fee should be stricken.

RCW 43.43.7541 was amended under House Bill 1783. The statute now provides that

[3] RP 692.

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added); Laws of 2018, ch. 269, § 18.

Lemafa's prior convictions include a 2015 adult felony conviction, as well as juvenile convictions. CP 53. Thus, his DNA has likely been collected. See former RCW 43.43.754 (2008) (requiring collection of DNA for adult and juvenile felonies); State v. Maling, __ Wn. App. 2d ___, ___ P.3d ___, 2018 WL 6630313, at *3 (Dec. 18, 2018) ("lengthy felony record indicates a DNA fee has previously been collected").

Under Ramirez, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Ramirez, 191 Wn.2d at 747. Thus, the DNA fee should be stricken.

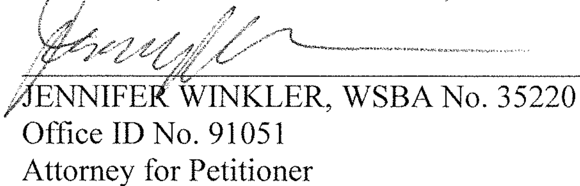
F. CONCLUSION

This Court should accept review and reverse both convictions. Moreover, the DNA fee should be stricken consistent with Ramirez.

DATED this 27th day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	No. 76356-3-I
v.	DIVISION ONE
MARLON IUPATI LEMAFA, Appellant.	UNPUBLISHED OPINION FILED: September 24, 2018

BECKER, J. — Appellant Marlon Lemafa was convicted of two counts of first degree assault. He challenges the sufficiency of the evidence underlying his conviction. We affirm.

The assaults occurred on December 13, 2015, outside a sports bar in Kent, Washington. Lemafa was involved in a chaotic brawl in the bar's parking lot. The scene was captured by several surveillance cameras.

Johnny Nav and Kim Ung spent the night socializing and playing pool at the bar. The fighting broke out around the time Nav and Ung were leaving. At trial, the prosecutor played exhibit 16, a composite of the surveillance video recordings. A police witness identified Lemafa, Nav, Ung, and other individuals on the video recordings and pointed out their movements. Nav saw people attacking a man lying on the ground. Nav, who thought he recognized the man,

intervened and separated him from his assailants, allowing him to escape. Nav realized he did not know the man and began to walk back to his car.

At this point, Nav exchanged words with Lemafa's cousin, Feronita Moe. Moe pushed Nav. Exhibit 16 at 1:40-1:50. Ung attempted to lead Nav away from the confrontation. Lemafa walked up behind Nav and punched him twice in the head, causing Nav to fall to the ground. Exhibit 16 at 2:40-2:45. Lemafa then punched Ung, who also fell to the ground, hitting his head against the curb as he fell. Lemafa kicked and punched Nav and Ung as they lay on the ground. Exhibit 16 at 3:40-4:05. Moe and her boyfriend Tony Talaga joined in, unleashing their own punches and kicks upon the prone Nav and Ung. Exhibit 16 at 3:40-4:05.

When the police arrived, they found Nav and Ung unconscious and bleeding in the parking lot. The assault ruptured Nav's left eye. He is now blind in the eye and will likely need to have it surgically removed. Nav's injuries left him unable to return to his job, unable to drive at night, and suffering from migraine headaches. He was still undergoing physical and speech therapy at the time of the trial. Ung suffered a concussion and a broken nose that required a metal plate to be inserted into his sinus area. The assault ruptured Ung's tympanic membrane, leaving him with partial hearing loss in his right ear.

The jury convicted Lemafa. His offenses were "serious violent offenses" as defined by RCW 9.94A.030(46)(v) requiring the court to impose consecutive sentences. RCW 9.94A.589(1)(b). The court imposed consecutive standard range sentences, totaling 222 months' imprisonment.

ANALYSIS

Sufficiency of the Evidence

"A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm . . . . assaults another and inflicts great bodily harm." RCW 9A.36.011(1)(c). Great bodily harm is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(1)(c).

Lemafa does not dispute that Nav's ruptured eye is great bodily harm. He argues that there is insufficient evidence to establish that he inflicted it. To determine if sufficient evidence supports a conviction, we consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Lemafa, Moe, and Talaga all participated in the attack on Nav. The State could not pinpoint exactly when Nav's eye was ruptured. One of the State's medical witnesses, Dr. Eissa Hanna, testified that Nav's injury is one that typically results from multiple blows. Absent evidence that directly establishes that it was a blow from Lemafa that ruptured Nav's eye, Lemafa claims the State lacked proof that he was the proximate cause of Nav's injury. Lemafa argues that he could be convicted only as an accomplice. Before a defendant can be convicted as an accomplice, the court must instruct the jury on accomplice liability. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

Because the court did not instruct the jury on accomplice liability, Lemafa argues that his conviction must be reversed for insufficient evidence of proximate cause.

To find that Lemafa was the proximate cause of Nav's injuries, the jury did not have to find that Lemafa was the sole cause. State v. Christman, 160 Wn. App. 741, 754, 249 P.3d 680, review denied, 172 Wn.2d 1002 (2011). "Although a defendant's conduct is not a proximate cause if some other cause is a sole or superseding cause, it can be a proximate cause if another cause is merely a concurrent cause. The same harm can have more than one proximate cause." Christman, 160 Wn. App. at 756; cf. State v. Bauer, 180 Wn.2d 929, 940, 329 P.3d 67 (2014) (holding that legal causation may not be found in a criminal case if "the accused did not actively participate in the immediate physical impetus of harm"). The jury watched video of Lemafa delivering two violent punches to the left side of Nav's face when Nav was facing the other direction. Nav fell to the ground, and Lemafa proceeded to kick and punch him as he lay defenseless. Lemafa's conduct was "not only intentional, but felonious, and capable of causing harm in and of itself." Bauer, 180 Wn.2d at 939. Considering the force of Lemafa's blows and the fact that the blows were to the area near Nav's left eye, a reasonable fact finder could conclude that Lemafa had criminal liability as a principal for causing Nav's ruptured eye. The lack of an instruction on accomplice liability is irrelevant.

As to the charge of first degree assault against Ung, Lemafa argues that Ung's hearing loss did not amount to significant permanent loss or impairment as required to prove great bodily harm. Lemafa claims a reasonable fact finder

would conclude that Ung's partial hearing loss was only temporary based on Ung's testimony that he was unsure whether the damage was permanent and that his hearing had improved somewhat by the time of the trial.

Lemafa overlooks Ung's testimony that his fractured tympanic membrane left him with a constant beeping noise in his ear. The noise was still present at the time of trial, nine months after the assault. Ung said he had been told there were no further medical treatments available to help with the problem. Based on this testimony, a reasonable fact finder could conclude that Ung's hearing impairment was significant and permanent. We conclude sufficient evidence supported the assault charges.

Prosecutorial Misconduct

Lemafa contends that a new trial is required due to the misrepresentation of evidence in the State's closing argument. The burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect rests with the defendant. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The comments at issue concern whether the impairment of Ung's hearing loss was permanent. The prosecutor stated the beeping noise in Ung's ear was "not going away":

> But you heard him testify about the damage to his hearing in his right ear, how it was muffled for a long time. It was kind of muffled is how he described it, almost holding his hand up to his ear. And that now, to this day, he hears beeping when he lays down when it's quiet. And that is not going away. That will be there. And the evidence has shown he had no problems with his hearing before that night.

Lemafa did not object to this argument.

On appeal, Lemafa contends the evidence does not support a finding that the hearing impairment was permanent. He argues that the prosecutor committed misconduct by misrepresenting the evidence.

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52, quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Because Lemafa did not object, he has waived the claim of prosecutorial misconduct.

Lemafa attempts to overcome his lack of objection to the prosecutor's remarks by recharacterizing the issue as whether defense counsel provided ineffective assistance by failing to object. He has not shown that prosecutorial misconduct implicates the ineffectiveness of counsel doctrine. See State v. Fisher, 165 Wn.2d 727, 757 n.8, 202 P.3d 937 (2009). Review under the standards for prosecutorial misconduct is sufficient to determine whether the prosecutor's remarks warrant reversal.

In any event, the prosecutor's statements did have a basis in Ung's testimony. Ung testified that he suffered from a constant beeping noise, his hearing had not returned to normal after nine months, and doctors informed him there was no further medical treatment available to remedy his hearing problems.

No. 76356-3-I/7

Affirmed.

Becker, J.

WE CONCUR:

Andrus, J.

[illegible]

APPENDIX B

FILED
11/28/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

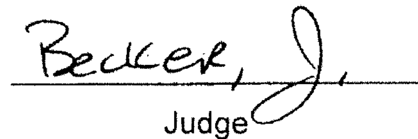
STATE OF WASHINGTON, Respondent, v. MARLON IUPATI LEMAFA, Appellant.	)	No. 76356-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Marlon Lemafa has filed a motion for reconsideration of the opinion filed on September 24, 2018. Respondent State of Washington has filed an answer to the motion. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

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